(12)

Office - Supreme Court, U. S.
FILED
SEP 2 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 127

J. H. HEMLER,
Petitioner,

versus

HOPE PRODUCING COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

G. P. BULLIS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 127

J. H. HEMLER,

Petitioner,

versus

HOPE PRODUCING COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

May It Please the Court:

Respondent, Hope Producing Co., has filed a brief in opposition to our application for writ of certiorari, which seems so misleading and confusing, that we beg to submit a short reply.

The basic facts in this matter are simple and entirely undisputed, as follows:

Petitioner, J. H. Hemler, leased his farm to respondent for oil and gas development, by a lease in form customarily used in Louisiana and elsewhere, stipulating that petitioner receive 1/8th of the market price of any gas produced.

Respondent, a subsidiary of Standard Oil Company of New Jersey, sold all the gas it produced in the field, (after first extracting the gasoline), by private sale, for an average of 4.832c per thousand cubic feet, and the other producers sold mostly for about the same price, all of these sales being made and delivered in the field, right in the midst of the gas wells where it was produced. Then respondent attempted to settle with petitioner, who was ignorant of such sales, by paying him on the basis of 3c as the market price.

In the reply brief, respondent does not squarely meet or discuss any of the issues raised in our application and original brief. May we show how they answer, or fail to answer, the three reasons we assigned for granting of writ.

I.

Our first reason was that the Court of Appeals failed to follow the established local jurisprudence, by denying to petitioner any royalty on gasoline.

The facts on this point are simple and undisputed. When natural gas comes out of the ground in the well, it contains gasoline, studded thru the gas. This gasoline, being very valuable, is first extracted, then the gas, (called dry gas after gasoline extraction), is sold, and is the gas used in commerce and homes. All of the sales and prices stated in this record and briefs, are for this dry gas. Natural gas with gasoline in it is not usable.

Since the lease contract stipulates that the landowner shall receive 1/8th of all that is produced from the well, obviously he should receive 1/8th of this gasoline.

We quoted in our original application, the jurisprudence of the Supreme Court of Louisiana, in the *Coyle* and *Wall* cases, expressly holding that the landowner is entitled to 1/8th of this gasoline.

Respondent's brief does not mention or discuss these cases, which is an admission that such is the jurisprudence of Louisiana.

Respondent's brief merely quotes in full the opinion of the Court of Appeals quoted in our original application, and which we here urged as error.

The opinion of the Court of Appeals, unless this Court intervenes, takes away from land owners all royalty on gasoline. A decision which thus takes millions of dollars out of the pockets of little farmers and land-owners, and puts them into the pockets of the big oil and gas companies, should be clear, explicit, and explain beyond any uncertainty why the Federal Court fails to follow the local jurisprudence. In all respect we suggest that the opinion of the Court of Appeals on this issue of gasoline, quoted at page 13 of petitioner's brief and at page 6 of respondent's brief, does not show these desiderata.

As this is one of the opinions for which we here ask review, we beg to submit a short analysis.

This opinion of the Courtof Appeals begins by mentioning a statute of the State of Louisiana, that the word "gas" used in a lease like the one in the case at bar, includes the gasoline content. The Supreme Court of Louisiana, in the decision quoted in our first brief, used this

to bolster their holding that the landowner was entitled to royalty on gasoline. The Court of Appeals states that this statute makes against, not for, our claim because it declares that the sale of gas carries to the purchaser all, not part, of its content.

We respectfully suggest that this statement of the Court of Appeals is obscure and not understandable. No issue is before the Court as to what a sale of gas carries to a purchaser. What bearing this has on petitioner's claim for gasoline royalty under a lease, is not explained by the Court. Neither does the Court explain why it construes this statute as against petitioner's claim, when the Supreme Court of Louisiana construes it as sustaining petitioner's claim.

Next the Court of Appeals opinion states that in the quoted cases before the Supreme Court of Louisiana, no issue was made as to the landowner being entitled to royalty on gasoline, it being admitted by both sides that the landowner was so entitled. Certainly the fact that in the State Court, both parties admitted that the landowner was entitled to royalty on gasoline, is overwhelmingly in our favor, instead of against us as the Court of Appeals holds. The Court of Appeals makes no explanation of its holding on this point.

Next the Court of Appeals states that in the *Coyle* case, the gas contained much more gasoline than in the case at bar. Why a landowner should be entitled to royalty on gasoline when the gasoline content is high, and not entitled when the gasoline content is lower, the Court does

not explain, and no reason for such a distinction seems possible.

Next the Court of Appeals states that in the lease at bar, the lessor sold to the lessee the gas at the well.

This seems a clear error as to the fundamental nature of an oil or gas lease. Lessor does not sell any gas to lessee. Lessor sells, in a mineral lease, the right to go on land and drill for oil or gas, and the right for the lessee to take any oil or gas produced, and pay lessor an agreed royalty. This is very different from lessor selling to lessee. The conception of a lease, by the Court of Appeals, as a sale of gas from lessor to lessee, is a novel doctrine, never before enunciated so far as we can find. It is contrary to the express language of the lease. It will most certainly lead to trouble as a precedent. Lessor could not possibly sell gas to lessee, because lessor never had any gas to sell. There was no gas anywhere until lessee produced and used it.

Furthermore, this dictum of the Court of Appeals seems entirely foreign and irrelevant to the case at bar. The issue here is solely what compensation lessor should receive. Whether lessor sold the gas to lessee, or whether lessee took it by right of a lease, is immaterial.

Next the Court of Appeals mentions the *Wall* case, cited in our original brief, and recites that the Supreme Court of Louisiana decided that lessor was entitled to 1/8th of the gasoline, just as we claim; but strange to say, the Court of Appeals assigns no reason whatever why it

refuses to follow the decision of the Supreme Court of Louisiana in this *Wall* case. The Court of Appeals does say that the gas involved in the *Wall* case had the same strong impregnation of gasoline as in the *Coyle* case. As we have shown above, this would be immaterial if true, but it is not true. The gas in the *Wall* case contained .5 gallons of gasoline per thousand cubic feet *(152 So. 562)*. The gas in the case at bar contained .4 gallons of gasoline per thousand (Record, p. 20). Certainly no distinction can be made between the case at bar and the *Wall* case on such a basis.

Lastly, the opinion of the Court of Appeals refers to the primary pleadings in the case. The Court of Appeals was not here referring to the case at bar, but this opinion was written in another case, the *Pardue* case, and brought into the case at bar only by reference.

Certainly in the pleadings in this case, petitioner stated his claim clearly and brought out clearly the distinction between the claim for gasoline and for dry gas (Record, pages 15-20), and we respectfully refer the Court to that statement, in our original bill of complaint in the case at bar, for the full statement of this gasoline matter.

We ask your Honors to note that unless this Court intervenes, the above decision, of which we believe the above is a fair analysis, will take millions of dollars of gas royalties from landowners. We respectfully suggest that this Court can save an immense injustice by reviewing this decision.

The brief of respondent on this issue, closes with this extraordinary statement (Page 11),

> "If plaintiff was paid one-eighth of the market value at the well-head for the gas produced from the well located on his property, including all of its elements (the jury found that he had been paid in full), then clearly plaintiff is not entitled to again be paid for one-eighth of the value of some one of these elements which was subsequently extracted from this gas at a distant point at a gasoline absorption point."

We are surprised that the reputable attorneys for respondent would make such an untruthful, misleading, statement, apparently in an attempt to deceive the Court.

Long before the trial of this case in the District Court, the District Judge struck from our bill of complaint all claims for gasoline royalty (Record, page 43). Our complaint had asked for additional royalty on dry gas and for royalty on gasoline, and with gasoline stricken, the case proceeded and was tried solely on our claim for royalty on dry gas. No claim has ever been made that the 3c paid to petitioner included gasoline royalty, the position of respondent being that petitioner was entitled to nothing for gasoline.

Hence, the above quotation from respondent's brief, insinuating that petitioner has been paid for gasoline once, and is claiming a second payment, is contrary to the elementary, undisputed facts in the case, and a bald attempt to deceive the Court.

II.

Our second reason for asking for this writ is that the Court of Appeals disregarded the established local jurisprudence, that in a lease such as this, the market price to which the landowner is entitled under the lease, is the market price in the field where the gas is produced. As we showed in our application, the gas field is a comparatively small area of land, thickly studded with gas wells, and the gas is sold at various points within this small field.

We quoted two decisions of the Supreme Court of Louisiana which squarely and expressly establish this jurisprudence.

It is highly significant that respondent's brief does not dispute these decisions nor the jurisprudence they establish. The silence of respondent is the best proof that our contentions are correct.

All respondent has to say on this subject is a lengthy quotation from the case of *Sartor v. United Co., 186 La. 555, 173 So. 105*, by the Supreme Court of Louisiana.

As this quotation shows, that Court first reiterated their previous holdings, that the market price was in the field, then that Court entered into a lengthy discussion of the evidence introduced on the trial of that particular case. This is clearly irrelevant to the case here at bar.

Respondent's brief makes no attempt whatever to link this opinion up with the issues here. Obviously the evidence in one case is rarely the same as the evidence in another case, hence lengthy rulings on the admissibility of

evidence in one case have little bearing on another case. To show the irrelevancy of this lengthy quotation, it covers the admission in evidence of certain pipe line contracts. In the case at bar none of these contracts were put in evidence.

For good measure, respondent's brief on this point ends with the statement that petitioner claims the market price on gas transported to a distant point and there sold. This is absolutely untrue, as is shown by our repeated statements that what we claim is the market in the field, right among the wells where the gas is produced.

III.

Our third reason for asking for this writ was that the Court of Appeals completely failed to consider, mention or decide, the issues we laid before it on appeal.

Respondent's brief completely ignores all the details of this matter.

We ask the Court to note the great significance of this silence. The failure of respondent's brief to deny, that we laid before the Court of Appeals many issues, detailed in our application and original brief, and that the Court of Appeals completely ignored and failed to decide any of these issues, proves that we are correct in our claims.

Respondent's brief mentions only one small detail of the claims in our original brief and application. We there said that the two cases decided by the Court of Appeals on the same day they decided the case at bar, did not involve the same issues, in the Court of Appeals, as did the case at bar, and did not decide the issues which we stated

had not been decided, in the case at bar, except on the subject of gasoline which we quoted in our application.

Respondent asserts that this is a misstatement of fact, and that we are endeavoring to mislead this Court.

The two cases above referred to, decided the same day as the case at bar, are:

Union Producing Co. v. Pardue, 117 F. (2d) 225;
Union Producing Co. v. Driskell, 117 F. (2d) 229;

In making this serious charge against counsel for petitioner, it would naturally be supposed that respondent's brief would quote from these cases, to show that we were wrong in our statement. The brief does not even mention such quotation.

All respondent offers to prove this serious charge, is a quotation from petitioner's brief in the Court of Appeals to the effect that when these three cases were started, the issues laid in the bills of complaint were the same, namely, what was the market price of gas. In other words, in each of these three cases, different landowners claimed the same thing, namely, a fair deal on royalty.

However, while the issues in these three cases were the same when they were filed, they met with quite a different history after filing. In two of the cases, the jury in the District Court found in favor of the landowner, and the gas company appealed. In the case at bar, the jury found for the gas company and the landowner appealed to the Court of Appeals. Obviously, while the issues were the same at the start of these lawsuits, the issues on the appeal

in the Court of Appeals was very different. The issues in a case where plaintiff appeals are the opposite of the issues when defendant appeals.

A mere reference to the two cases above cited, shows that we were correct in our statement that the issues there decided were not the same as in the case at bar, and the gratuitous reflection on counsel for petitioner is grossly untrue.

ERROR.

In our original application for writ in this case, at page 3, we stated that the average price of sales was 3c to 4c. We should have stated this as 4c to 5c.

CONCLUSION.

We understand the purpose of having respondent in applications for writ, file a brief, is that the Court may have the benefit of the views of opposing counsel contradictorily.

In the case at bar, the remarkable fact that respondent's brief makes no serious attempt to dispute the facts and law stated in our application and original brief, proves conclusively that we are correct in our position. The Court does not have to take our assertions alone. They are backed up and proved true by the failure of respondent to deny.

We ask the Court specially to note that respondent does not deny the assertions in our application and original brief, as to the general importance of this case, and the large sums involved. As we there stated, the form of lease

in this case is the same as in countless other leases, widely used both in the State of Louisiana and elsewhere, hence the decision in this case settles the issues for thousands of landowners and millions of dollars in royalty.

If the decision of the Court of Appeals is allowed to stand, landowners lose millions of dollars in gasoline royalty. Probably more important is that the requirements of the Court for any suit they file are so impossible, technical, and dependent on expert testimony, as we showed in our original brief, that a landowner cannot file a suit regarding the amount due him, with any prospect of success, and must accept whatever the gas companies see fit to pay him.

We therefore humbly feel that this case is worthy of the attention of this mighty Court.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioner.